

IN THE MATTER OF THE ONTARIO HUMAN
RIGHTS CODE R.S.O. 1970, CHAPTER
318, AS AMENDED.

AND IN THE MATTER OF A COMPLAINT
BY ANNE M. MUCCILLI AGAINST ED'S
WAREHOUSE RESTAURANT

BOARD OF INQUIRY

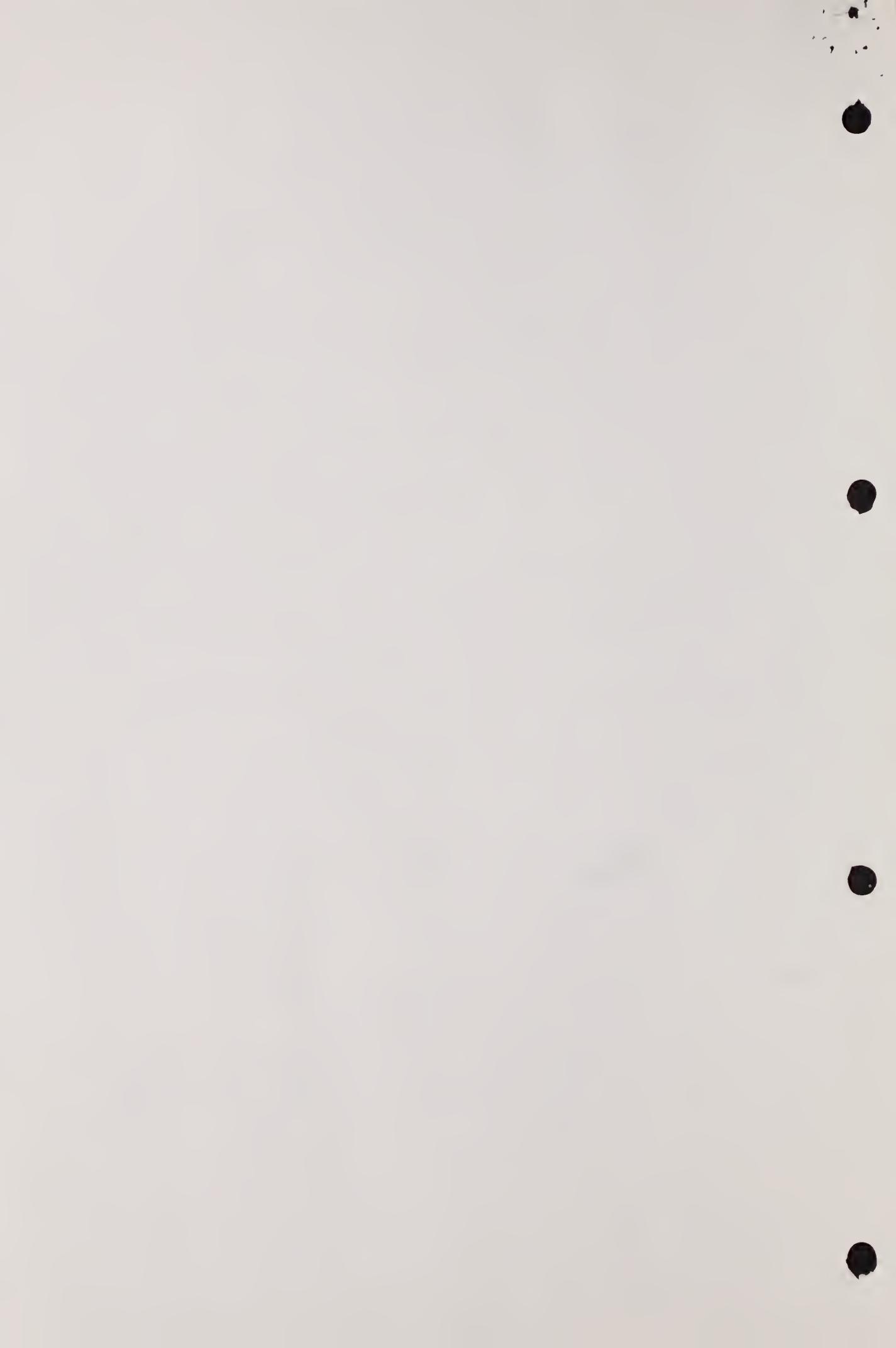
Bruce Dunlop

APPEARANCES

Janet E. Minor - For the complainant and
the Ontario Human Rights
Commission

Malcolm Robb, Q.C. - For Ed's Warehouse Restaurant

Hearing: January 24, April 30, 1979



In May of 1976 Anne Muccilli had a part-time job but was looking for full-time employment. She saw an advertisement in the Toronto Star which read as follows:

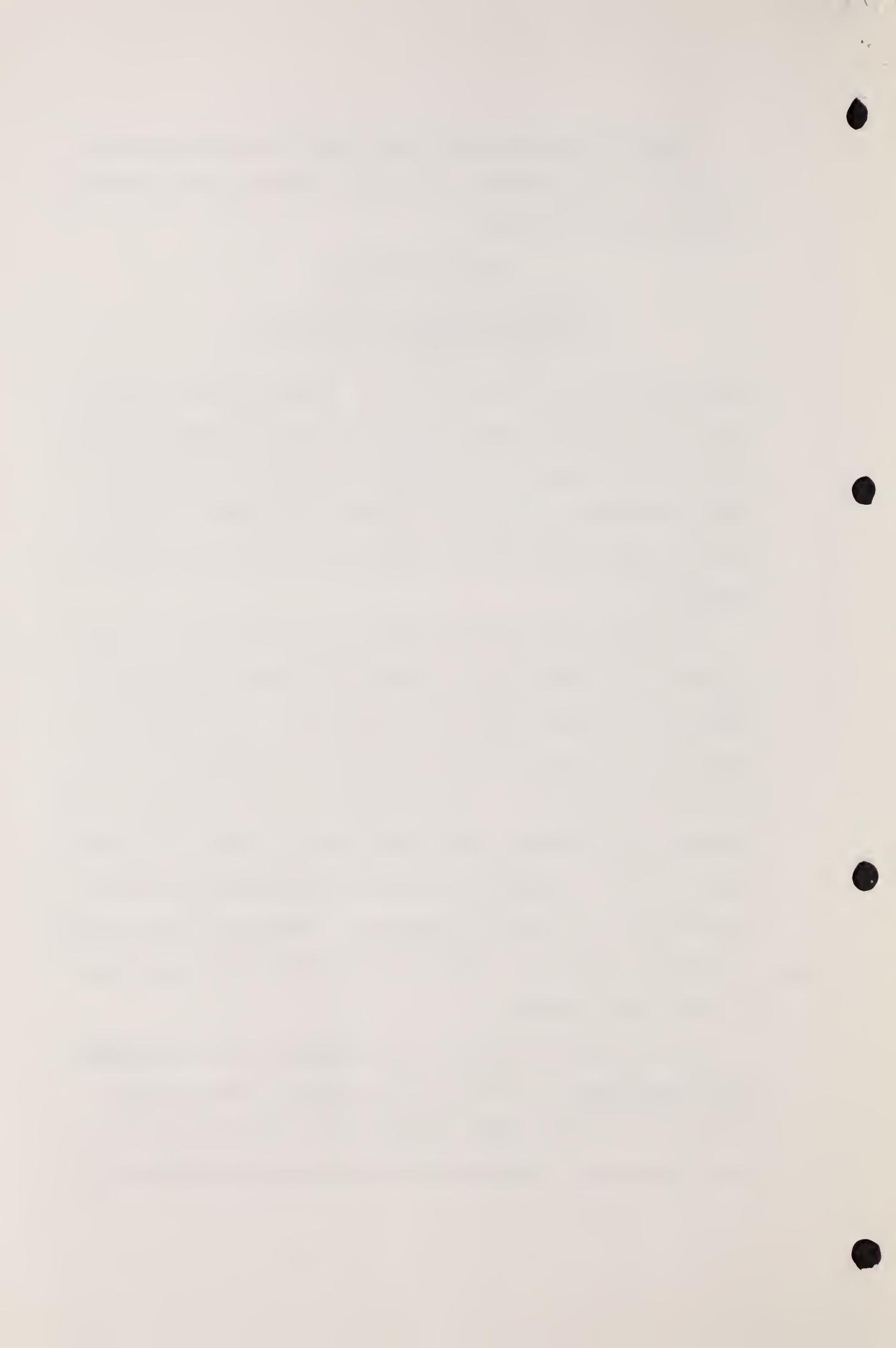
WAITERS-WAITRESSES

WAITERS-waitresses, for Ed's
Warehouse Restaurant, 270 King St.
W. See Mr. Simpson 4-5 p.m.

Miss Muccilli decided to seek this job. Although she was prepared to do so, she hoped she would not have to take time off her current work in order to apply. She therefore telephoned to ask whether it would be possible to come at a later hour. The number she called was the number listed in the telephone directory for Ed's Warehouse Restaurant.

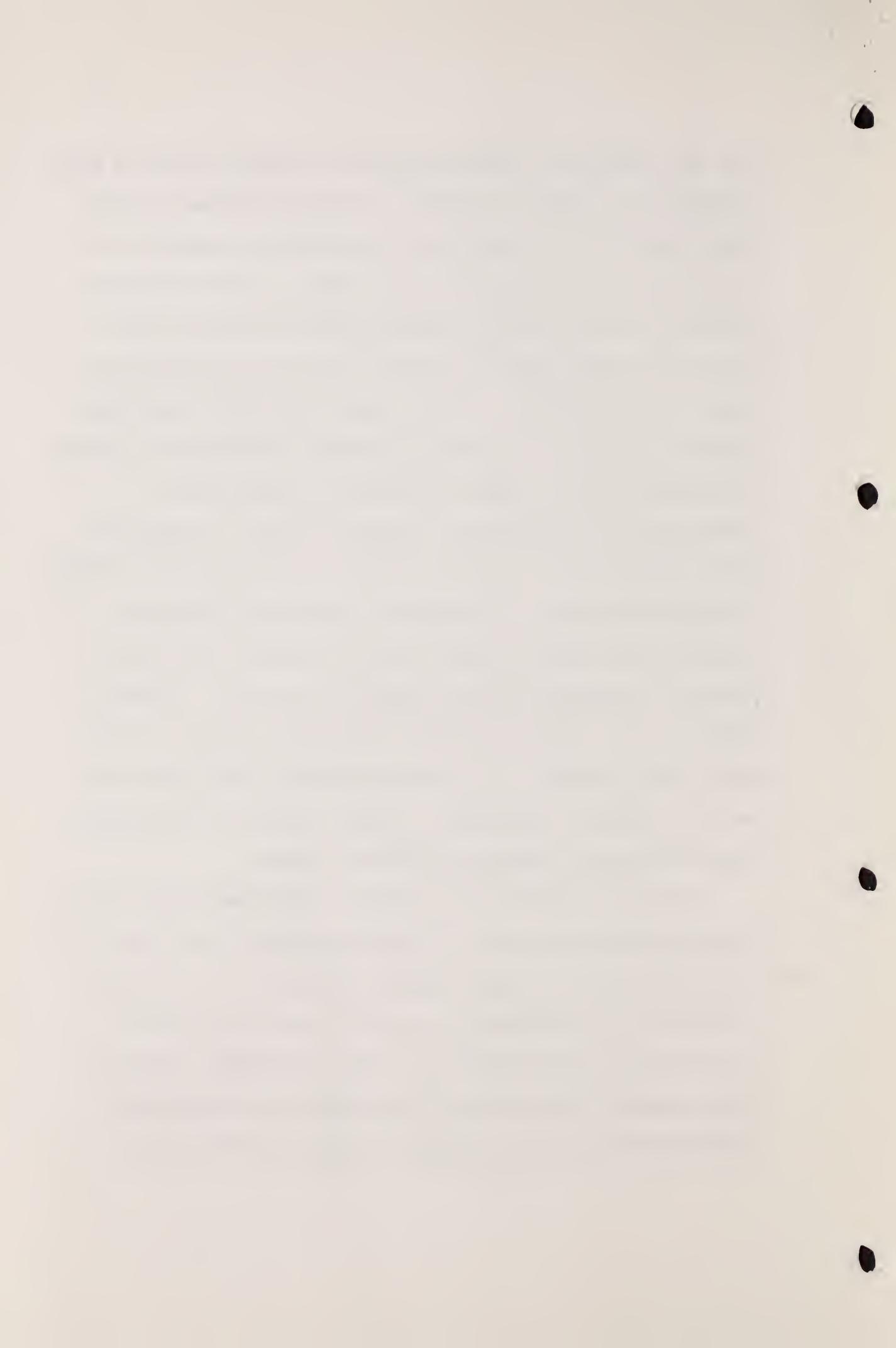
According to her uncontradicted evidence, Miss Muccilli asked to speak to Mr. Simpson and was asked by the unidentified man who answered the telephone what her call was about. When Miss Muccilli explained, the man said "Well actually, we're looking for a waiter. We don't hire waitresses". When Miss Muccilli drew attention to the wording of the ad the man replied that this was their way of getting around the law. He denied that this constituted discrimination and asserted that it was merely a preference. According to Miss Muccilli a subsequent inquiry by a friend of hers elicited the response that the job had been filled.

The next day Miss Muccilli filed a complaint under the Ontario Human Rights Code R.S.O. 1970 c.318 as amended. Section 4(1)(b) says that no one shall refuse to employ any person because of the sex of such person. Section 4(6) makes an exception where sex is a



bona fide occupational qualification but no attempt was made in these proceedings to invoke the exception. Evidence of officers of the Ontario Human Rights Commission who investigated the complaint indicated that in conversations with Mr. Simpson and Mr. Ed Mirvish, the owner of the restaurant, there had been some indication that they did not regard women as "suitable" for the job of waiting on tables in the restaurant. For this reason they never hired women. However, no evidence as to unsuitability was offered and the evidence of Professor Norman J. Ashton, Chairman of the Department of Kinesiology at the University of Waterloo and Mary L. McGregor an experienced waitress, dining-room hostess and booking agent arranging employment for waiters and waitresses in hotels and restaurants established that women in general and Miss Muccilli in particular possessed the requisite physical capacity for the job. Professor Ashton had done a number of tests involving Miss Muccilli and had gone to the restaurant to see what was entailed in the particular job. Mrs. McGregor testified to the many varieties of waiting jobs which she had seen competently performed by women.

Mr. Robb, on behalf of Ed's Warehouse Restaurant stated at the beginning of the hearing that "we acknowledged that we will not discriminate against a woman otherwise qualified to be a waiter or a waitress at our restaurant and such will have an opportunity equal to that of a male applicant." This is a welcome assurance. At the same time the evidence of the officers of the Commission established that at one time there was a policy followed by the

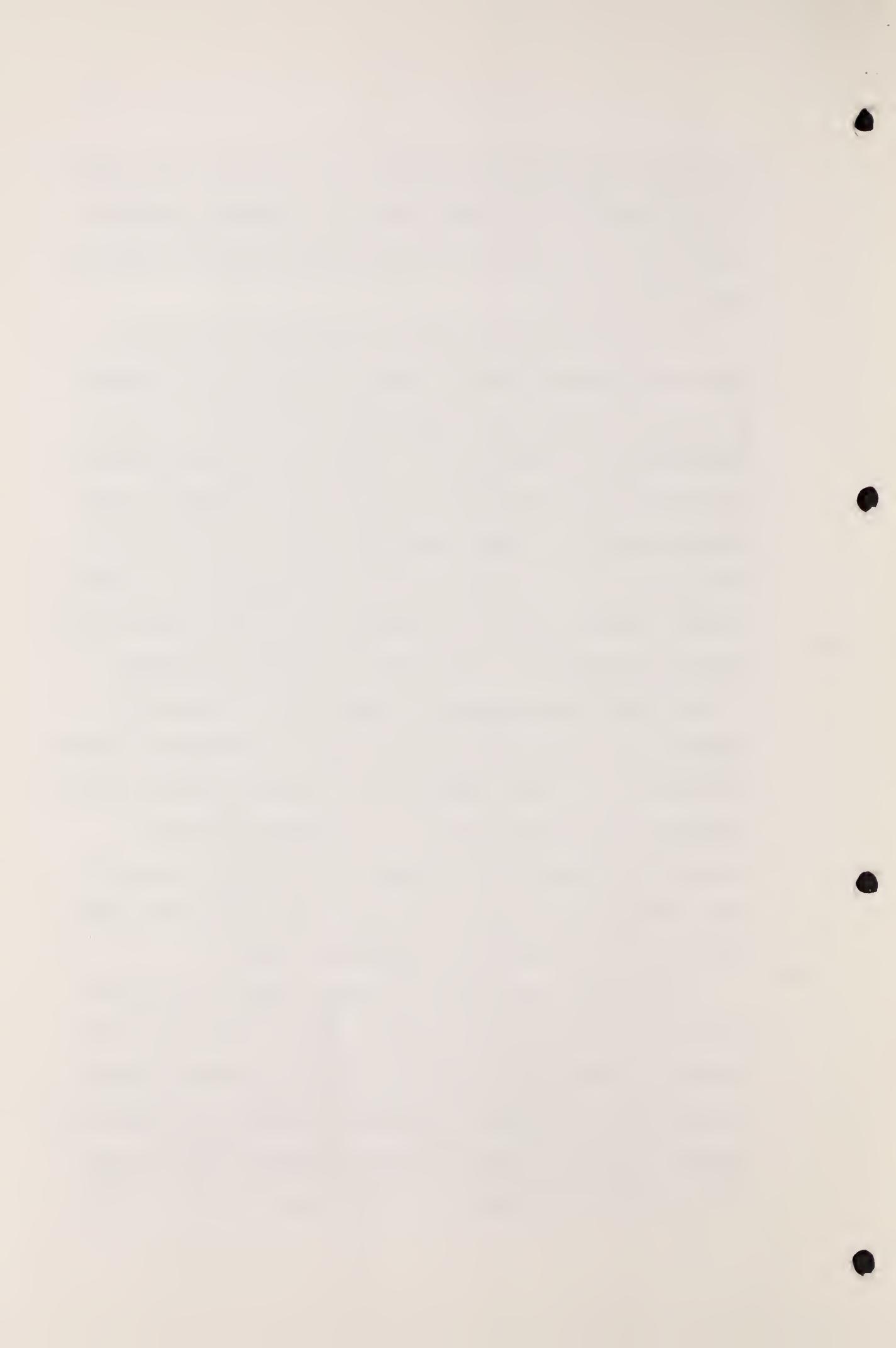


Restaurant of refusing to hire women to wait on tables. The policy had been admitted. The central issue in this inquiry is whether, in accordance with this policy, Ed's Warehouse Restaurant refused to employ Anne Muccilli.

Mr. Robb cross-examined witnesses called by Miss Minor but called no witnesses of his own, taking the position that there was no evidence to support the alleged breach of the Code. Mr. Robb contended that Miss Muccilli had not applied for a job because she had not followed the instructions contained in the newspaper advertisement to attend in person between the hours of 4 and 5 p.m. at 270 King St. West. As Miss Minor correctly pointed out, one cannot, in effect, prevent a person from applying for a job and then rely on the failure to apply as a fatal flaw in the person's complaint.

Mr. Robb, however, argued that the evidence concerning the telephone call did not establish that anyone in authority had spoken to Miss Muccilli. Hence responsibility for precluding Miss Muccilli's attendance could not be visited on Ed's Warehouse Restaurant. Miss Minor submitted that I was entitled to find that an employee armed with apparent authority discouraged Miss Muccilli from applying for the job. In all the circumstances, I agree.

To begin with, Miss Muccilli called the number listed by the Restaurant in the telephone directory. The man who answered spoke of a policy concerning the hiring of women, the existence of which was confirmed by subsequent investigation. The man who answered the telephone interposed himself between Miss Muccilli and Mr. Simpson in an apparently knowledgeable and authoritative manner. The only



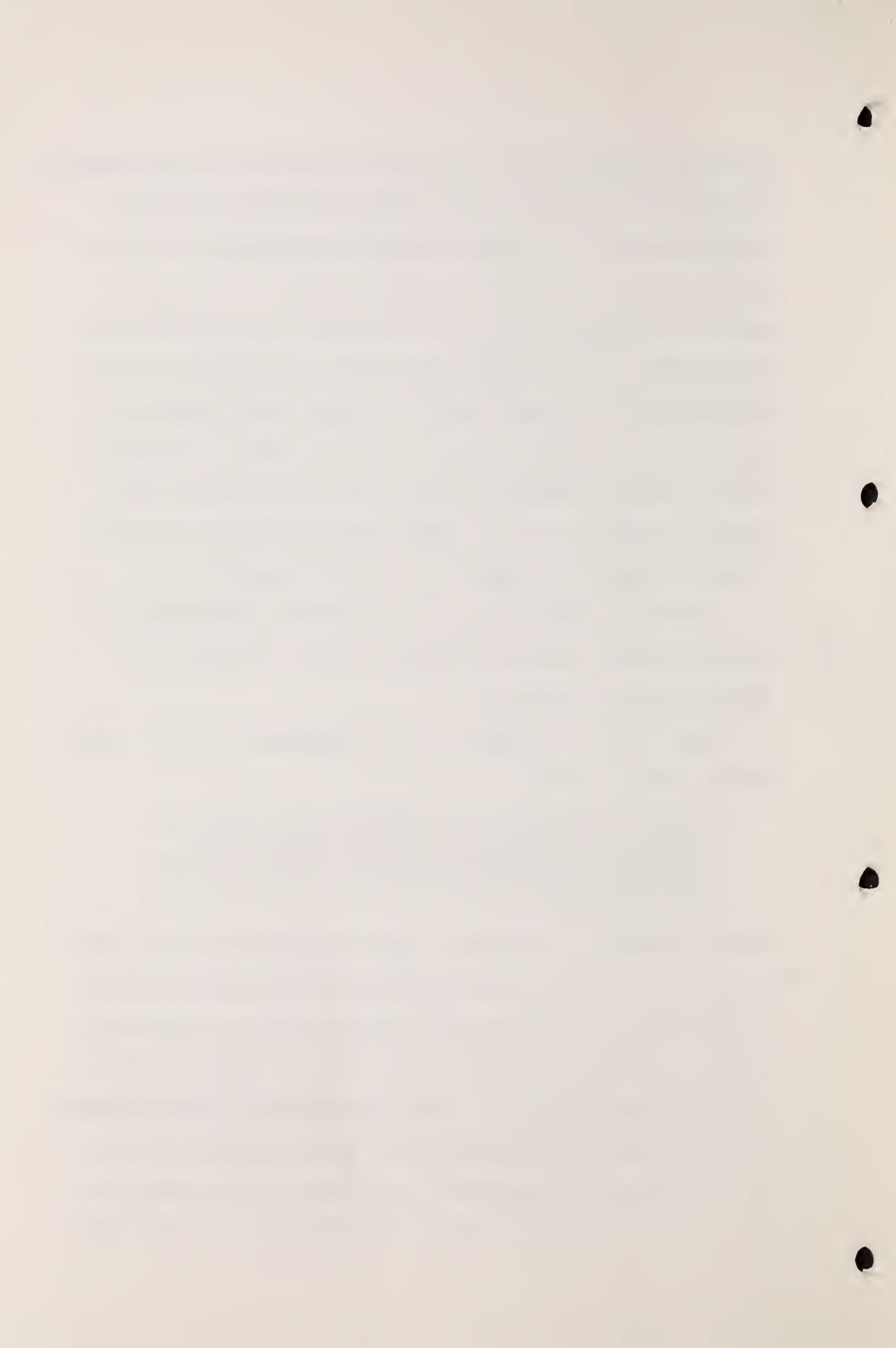
realistic inference that arises from all these facts is that the person who answered the telephone was a knowledgeable employee whom the caller was entitled to accept as speaking on behalf of the business enterprise. It is difficult to imagine a potential job applicant persisting in appearing for an interview when faced with this kind of dissuasion. The respondent must accept the consequences. The mere suggestion in argument that the telephone could have been in a public place and might have been answered by a prankster does not raise a rational alternative conclusion on the established facts. Evidence in support of such a proposition would be required before I would be prepared to regard it as a realistic possibility.

The Board therefore finds that Ed's Warehouse Restaurant did refuse to employ Anne Muccilli because of her sex contrary to section 4(1)(b) of the Code.

What should be the remedy in the circumstances? Section 14c(b) provides that the Board

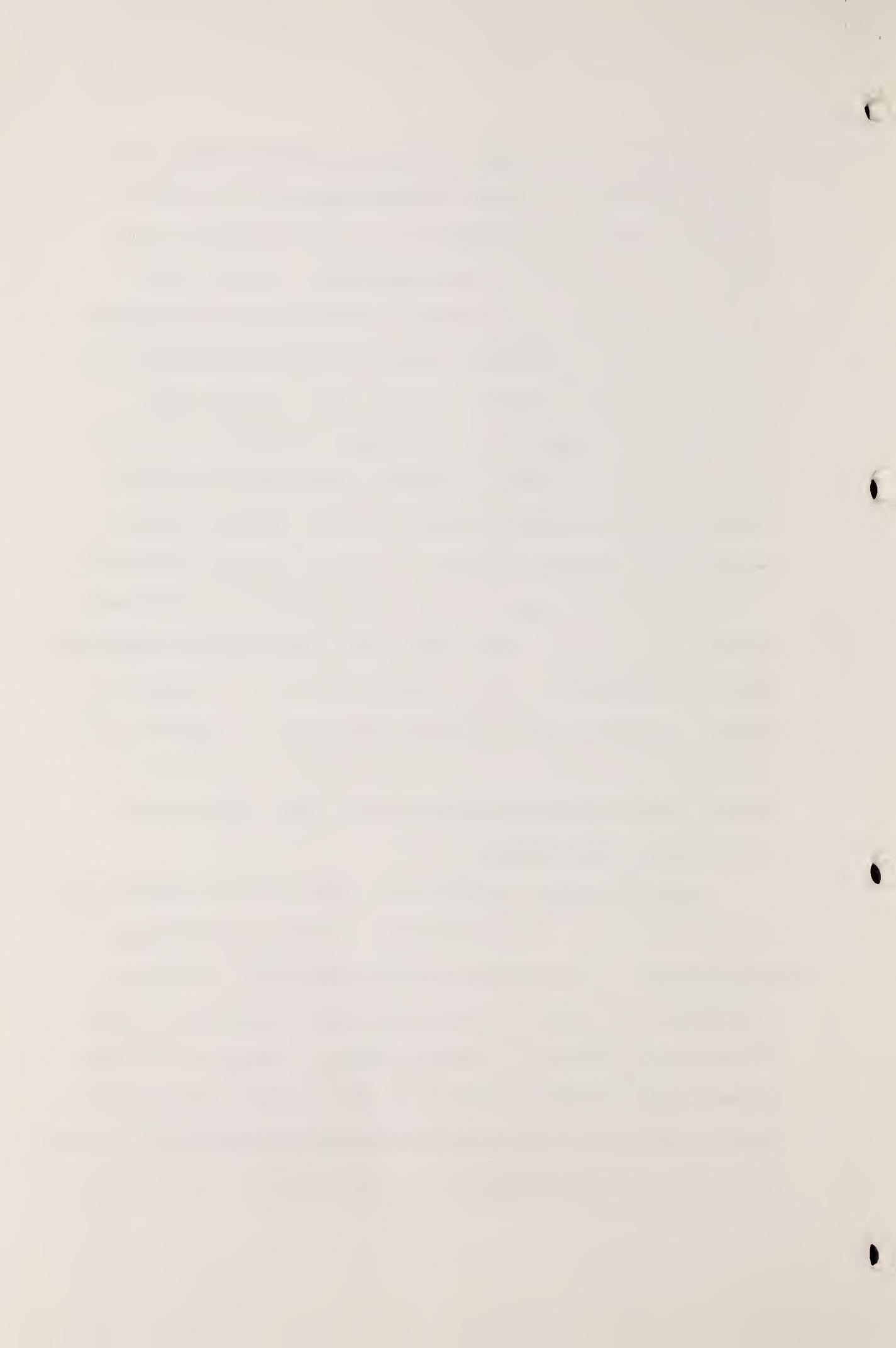
may order any party who has contravened this Act to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

Several remedies were requested. First the Board was asked to award compensation to Miss Muccilli both for the loss of potential income attributable to the discriminatory behaviour and for the affront involved. Entitlement to compensation for loss of income is clearly within the contemplation of s. 14c(b) and needless to say is commonly awarded in proceedings under the Code. General damages for insult may be within the contemplation of the section as well although, to me at least, this is not so clear, notwithstanding that other boards



of inquiry have awarded them. In the law generally damages for injury to feelings are rather narrowly confined and I would be reluctant to find in the language of s. 14c an intention on the part of the Legislature to allow them freely. It may be that a breach of the Code could constitute a sufficiently wilful invasion of an individual's dignitary interest to justify an award under this head. I do not think that this is such a case. I do not think Miss Muccilli was deeply hurt or offended. On the other hand she was quite properly aroused and suffered considerable frustration while spending a substantial amount of time in seeking redress. I would therefore readily hold that in addition to loss of potential income Miss Muccilli should receive compensation for the time and trouble that were also a part of the loss flowing from the respondent's act of discrimination. These are matters that the law recognizes as having a pecuniary value justifying compensation. On the basis of the evidence presented I would fix the potential income loss at between \$500 and \$600 and would order that total compensation of \$900 be paid to Miss Muccilli.

The second remedy requested was an order that the respondent be required to write a letter undertaking to comply with the Human Rights Code. It is not clear to me that this kind of remedy is contemplated by s.14c. It is not obvious that requiring a promise of future good conduct is justified either as a matter of full compliance with the provision of the Act that has been contravened or as being necessary to rectify any injury resulting therefrom. In any event, the respondent having given an undertaking to this Board not

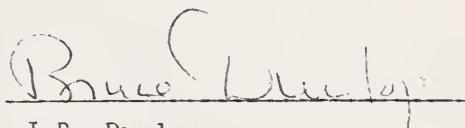


to breach the relevant provision in future, I am satisfied on this count.

Finally I was asked for an order permitting the Commission to monitor the hiring practices of the respondent for a period of 18 months. Here again I have difficulty with the proposition that my authority to bring about full compliance and rectify any injury justifies such a drastic intrusion into the private affairs of a party who has been found in contravention of the Act. One worries that in advancing the human rights of one person one may go too far in infringing the civil rights of another. Certainly I would be hesitant to order that a party be subjected to what is akin to a form of surveillance except in the most compelling circumstances. The circumstances in this case do not, in my view, meet this test. The respondent did not seek to conceal its former policy and has given assurance that it will in future comply with the Code. Absent grounds to question the bona fides of this undertaking I am prepared to accept it at face value.

In the result I order the respondent to pay the complainant the sum of \$900 but decline to order any further remedy.

DATED at Toronto this 5th day of July, 1979.



J.B. Dunlop
Chairman
Board of Inquiry

